> "It should be remembered at the outset that, while a true cross-section is the ultimate ideal, it is by no means the Constitutional mandate. What is required is a jury selection system free of discrimination against properly cognizable groups." United States v. Butera, *supra*, 420 F.2d at 572.

As illustrated in Section I above, defendants have made no showing that they have been denied a cross section of the community in their grand jury venire, in violation of their right to equal protection.

Defendants' request for discovery of every fourth questionnaire mailed by the Clerk in November, 1969, and returned prior to May 10, 1970, and for a hearing on the questionnaire data, is denied for the reasons stated in Section A above. Defendants' motion to dismiss the indictment on the grounds that the grand jury was improperly constituted is also denied.

V. Motion for Discovery

Defendants Kahn and Teleprompter move for discovery and inspection pursuant to Rule 16, Fed.R.Crim.P.

1. The Government has consented to requests (a),[8] (b),[9] and (e).[10]

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[8] The transcripts of the testimony of defendant Irving Kahn before the grand jury.

[9] Any other relevant written or recorded statements by defendant Kahn within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorneys for the government, including, but not limited to, typewritten or handwritten statements, reports of interviews, notes of interviews, (whether signed or unsigned) and tape or wire recordings, whether made by an attorney for the government or by any other government employee.

[10] Any relevant results or reports of scientific tests or experiments made in connection with this case, and with the investigation leading to the indictment, or copies thereof, as are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorneys for the government, including, but not limited to, fingerprint reports, voice analysis reports and handwriting analysis reports.

2. Requests (d)[11] and (f)[12] are granted.[13] Defendant Teleprompter is entitled to the grand jury testimony of its officers, directors, agents and employees requested in (d). United States v. United Concrete Pipe Corp., 41 F.R.D. 538 (N.D. Tex. 1966). The court also grants request (f) as authorized by Rule 16(b), since it is reasonable and material. The grant, however, is only as to the prior criminal records of each person named in the indictment as a defendant or co-conspirator. Investigations made by the Government as to these persons are denied.

3. Requests (c)[14] and (g)[15] are denied. The Government is ordered to permit defendants Kahn and Teleprompter to inspect and copy transcripts of the grand jury testimony of any persons listed in request (c) who were employees, officers, agents, directors or attorneys of Teleprompter at the time they so testified. In all other respects request (c) is denied. The court is advised that defendants Tompkins, Deardorff and McKee may testify for the Government at trial. Their statements requested in

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[11] The transcripts of the testimony of any other officers, attorneys, agents, directors, or employees of defendant Teleprompter Corporation or its Johnstown subsidiary, Johnstown Cable T.V. before the grand jury.

[12] Any and all reports in the custody or possession of the government which set forth the prior criminal records or investigations with respect to each person named in the indictment as a defendant or co-conspirator.

[13] They are granted only to the extent noted in the opinion, of course.

[14] The transcripts of the testimony of Eugene Weinrich, Caywood Cooley, Walter Kinash, Samuel R. Di Francesco, Jr. and Walter Schier before the grand jury.

[15] Any and all written or recorded statements or confessions made by any of the other persons in the indictment named as defendants or as co-conspirators.

(f) are therefore statements by prospective Government witnesses, specifically exempt from discovery under Rule 16(b).

VI. Motion for a Bill of Particulars

Defendants Kahn and Teleprompter have moved for a bill of particulars.

1. The Government has consented to request number 1.[16]

2. Requests number 2 [17] and 5 [18] are granted.

3. Requests number 3,[19] 4,[20] and 6[21] are denied. These requests are inquiries into the legal theory of the Government's case, and hence not a proper aspect of a bill of particulars. See United States v. Schillaci, 166 F. Supp. 303, 307 (S.D.N.Y. 1958).

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[16] With respect to paragraph "1" of Count One of the indictment the names of the "other persons whose names are to the grand jury known" who the government will contend conspired with defendants to commit offenses in violation of 18 U.S.C. § 1952 and the names of such alleged co-conspirators who were unknown to the grand jury, but who have since become known to the government.

[17] With respect to paragraph "2" of Count One of the indictment, whether the government will contend that the "unlawful activity" referred to therein was bribery in violation of Title 18 §§ 4303 and 4304 of the Penal Code of the State of Pennsylvania and, if not, which Pennsylvania statutes were allegedly violated.

[18] With respect to Count Two of the indictment, the acts which constitute the alleged criminal activity, specifying the time and location of the acts.

[19] With respect to the entire indictment, whether the government will contend that the bribery alleged therein was part of an unlawful course of interstate racketeering.

[20] With respect to the entire indictment, whether the government will contend that any of the defendants were racketeers and, if so, the identity of such defendants.

[21] With respect to the entire indictment, on what legal basis the government contends that Teleprompter has committed a crime.

APPENDIX D

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of January one thousand nine hundred and seventy-three.

Present:

HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges,

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

J. HOWARD DEARDORFF, IRVING KAHN, ROBERT MCKEE, KENNETH TOMPKINS, TELEPROMPTER CORPORATION,

Defendants,

IRVING KAHN AND TELEPROMPTER CORPORATION,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX E

Relevant Statutes, Constitutional Provisions, and Rules

18 U.S.C. 1621. PERJURY GENERALLY

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 U.S.C. 1623. FALSE DECLARATIONS BEFORE GRAND JURY OR COURT

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary

to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Appendix E—Relevant Statutes, Constitutional Provisions, and Rules

18 U.S.C. 1951. INTERFERENCE WITH COMMERCE BY THREATS OR VIOLENCE.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101—115, 151—166 of Title 29 or sections 151—188 of Title 45.

18 U.S.C. § 1952 "INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

Appendix E—Relevant Statutes, Constitutional Provisions, and Rules

N. Y. PENAL LAW 200.05 BRIBERY; DEFENSE.

In any prosecution for bribery, it is a defense that the defendant conferred or agreed to confer the benefit involved upon the public servant involved as a result of conduct of the latter constituting larceny committed by means of extortion, of an attempt to commit the same, or coercion, or an attempt to commit coercion.

FED. R. CRIM. P. 52 HARMLESS ERROR AND PLAIN ERROR.

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

ARTICLE 3, SECTION 2, CLAUSE 3. CRIMINAL TRIAL BY JURY.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Appendix E—Relevant Statutes, Constitutional Provisions, and Rules

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix E—Relevant Statutes, Constitutional Provisions, and Rules

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX F

Legislative History 18 U.S.C. 1623

Statement Senator John McClennan, introducing 18 U.S.C. 1623 on floor of Senate:

> "Mr. President, Title IV of S. 30 represents the best efforts of the committee to insure that truthful testimony will be given in our grand juries and courts.
>
> * * *
>
> "The last impediment to the telling of truth is that under present Federal law one is not allowed to recant, correct untruthful statements, and escape prosecution.
>
> * * *
>
> "Mr. President, Title IV encourages truth by facilitating the prosecution of those who have lied and by encouraging the correction of testimony without fear of prosecution. I am firm in my belief that this body should do everything in its power to make certain that there are no impediments to truthful testimony in the administration of justice in the Federal courts in all cases as well as the more serious organized crime cases." 116 *Cong. Rec.* 589 (1970)

Testimony of Ronald L. Gainer, Deputy Chief, Legislation and Special Projects, Criminal Division, Department of Justice, in support of 18 U.S.C. 1623:

> "Mr. Zelenko: Should Section 1621 of existing law remain on the books?
>
> "Mr. Gainer: Title IV is written to supplement the existing perjury provisions.
>
> "Mr. Zelenko: Title IV provides a much more substantial penalty, does it not—$10,000 fine or 5

years imprisonment, or both?

"Mr. Lynch: I believe that Section 1621 also has a 5-year penalty, but a lesser fine.

"Mr. Zelenko: How would the sections co-exist?

"Mr. Gainer: Section 1621 would cover proceedings that this does not."

Hearings on S. 30 Before Subcommittee No. 5 of the House Comm. on the Judiciary, 91st Cong. 2d Session 637 (1970)

APPENDIX G

Excerpts From Record

Trial Court's Instructions

"The crime of bribery under Pennsylvania law is also committed by anyone who gives or offers or causes to be given or offered any money . . . with the intent to influence that public officer with respect to any official act."

* * *

". . . It is sufficient if the paying party intended that the official be influenced in some way . . ."

* * *

"Mr. Kahn testified before the grand jury on January 27, 1971 that Mayor Tompkins used improper economic pressure to force Teleprompter Corporation into making a payment in order to secure a franchise to operate in Johnstown.

Tompkins and Deardorff denied having conducted themselves in this fashion. Whether they did or did not so conduct themselves is an issue of fact for you, the jury. But if you find that there was such pressure by Tompkins and Deardorff, and if you find that thereafter Kahn paid money because of such pressure, then you may consider the conduct of Tompkins and Deardorff as bearing on the issue whether Kahn, in making such payment or payments, had the requisite intent to influence action of a public official, which is an essential element of the offense of bribery under Pennsylvania law, as I have already described to you."

Defendants' Requested Instructions

"The defendants contend that the payments made to the Johnstown officials did not constitute a bribe, but were

paid as a result of extortion, under fear of injury to their cable TV franchise."

* * *

"You will recognize that whether the $15,000 payment was a bribe or an extorted payment presents an issue of fact.

"If you find that the money paid to the Johnstown public officials was paid as a result of extortion, you must find defendants TPT and Kahn not guilty on Counts 1-4. Moreover, if after evaluating all the evidence you have a reasonable doubt as to whether the moneys were paid as a result of extortion, you must find the defendants not guilty on those counts."

* * *

"If you find the evidence presented by the defendants raises a reasonable doubt in your mind as to whether the payments were made as a result of threats of injury to their franchise rather than with a specific criminal intent to bribe the officials in Johnstown in order to influence their official action you must find both defendants not guilty on Counts 1-4."

Colloquy

"Mr. Maloney: If your Honor please, that concludes the reading of the minutes of December 17th, 1970.

May the record reflect Exhibit 18 in evidence is the reappearance of Mr. Kahn before the grand jury on January 27th, 1971 after the appearance of the Mayor on December 22nd, and after the appearance of Deardorff on December 29th, I believe.

Mr. Fleming: Your Honor, before Mr. Maloney begins to read Mr. Kahn's testimony on the second occasion, might we approach the bench?

(653) The Court: Yes.

(At the side bar.)

Mr. Fleming: If your Honor please, Mr. Kahn read a statement in the grand jury which Mr. Maloney is about to read. That statement was submitted to Mr. Morvillo prior to Mr. Kahn's appearance in the grand jury and Mr. Morvillo made certain deletions from the statements before, as I understand the situation, he would allow Mr. Kahn to read it into the grand jury.

I was wondering, if your Honor please, if you would consider allowing these statements which were deleted by Mr. Morvillo to be put into the record at this time with regard to this testimony.

Mr. Maloney: I object to it as being hearsay. If Mr. Kahn wants to testify about him let him do so. All I have here is the grand jury testimony of Mr. Kahn.

The Court: As he actually gave it?

Mr. Maloney: As he actually gave it.

The Court: And this is a statement he prepared?

Mr. Fleming: A statement was submitted to Mr. Morvillo, requesting permission to make the statement. This ran over a long period, it started December 18, but the result was this statement which Mr. Kahn wanted to read in the grand jury. It was presented to Mr. Morvillo.

(654) You can see certain deletions were made before Mr. Kahn was allowed to give it. For example, in the second full paragraph, the second sentence reads—you will remember that I told you—

The Court: I understand it now.

Mr. Maloney says what he is about to read is the grand jury testimony, and you object to that?

Mr. Fleming: That's right.

The Court: I can't see any objection to his reading in the testimony as actually given. I don't understand the objection.

Mr. Fleming: My difficulty is that the deletions which were made which were a condition of allowing him to reappear and give a full statement on this matter—the deletions in fact change the substance—if your Honor would look at the two deletions at which I am pointing, the thrust of the statement, for example, here Mr. Kahn was prepared to say, and was not allowed to say by Mr. Morvillo: "Some of the facts I now discovered are inconsistent with what I said because I have now had a chance to refresh my recollection and review the records of Teleprompter."

"He wasn't allowed to say that."